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Supreme Court, U.S.
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No.____

In The

Supreme Court of the United States

Anthony Diodoro,

Petitioner,

v.

Commonwealth of Pennsylvania,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the Supreme Court of Pennsylvania erred when it affirmed Petitioner's judgment of sentence finding that the mere accessing and viewing of child pornography over the internet, but not saving or otherwise manipulating these images, constituted "control" of such pornography under 18 Pa.C.S. § 6312(d), where such an interpretation of the statute fails to provide a person of ordinary intelligence fair notice that merely accessing and viewing child pornography on the internet constitutes "control" of child pornography sufficient to support a conviction under 18 Pa.C.S. § 6312(d)?

LIST OF PARTIES

1. Anthony Diodoro, Petitioner

2. Commonwealth of Pennsylvania, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Diodoro respectfully seeks a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania was filed on May 26, 2009 and is reported at Commonwealth v. Anthony Diodoro, 2009 WL 1449366 (PA. 2009). App. 1-31.

The order entered by the Supreme Court of Pennsylvania on December 24, 2007 granting the Petition for Allowance of Appeal and rephrasing for clarity the issue to be determined is reported at Commonwealth v. Anthony Diodoro, 939 A.2d 290, 595 Pa. 537 (2007). App. 32.

The opinion of the Superior Court of Pennsylvania was filed on August 23, 2007 and is reported at Commonwealth v. Anthony Diodoro, 932 A.2d 172, 2007 Pa.Super. 256 (2007). App. 33-57.

The opinion of the Superior Court of Pennsylvania, which was filed on November 2, 2005 and was subsequently withdrawn, is reported at 2006 WL 3095476 (Pa.Super.), 2006 Pa.Super. 308. App. 58-70.

The opinion of the Court of Common Pleas of Delaware County, Pennsylvania, the Honorable Joseph P. Cronin was filed on December 29, 2005 and was not reported. A copy of the opinion is part of the Appendix at pp. 71-85.

JURISDICTION

On May 26, 2009, the Supreme Court of Pennsylvania issued an opinion affirming the judgment of sentence against Diodoro, finding that accessing and viewing child pornography over the internet constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d). App. 1-31.

The jurisdiction of this Court to review the judgment of the Supreme Court of Pennsylvania is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

Pennsylvania Consolidated Statutes, Crimes and Offenses
18 Pa.C.S. § 6312(d)(1)

Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

Pennsylvania Consolidated Statutes, General Provisions
1 Pa.C.S. § 1922

(b) All provisions of a statute of the classes hereafter enumerated shall be strictly construed:

(1) Penal provisions.

Pennsylvania Consolidated Statutes, General Provisions
1 Pa.C.S.A. § 1928(b)

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

(1) That the General Assembly does not intend a result

that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

(4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.

(5) That the General Assembly intends to favor the public interest as against any private interest.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case is a criminal matter wherein the Supreme Court of Pennsylvania determined that merely accessing and viewing child pornography over the internet, without downloading, printing, saving or knowing that images were automatically saved in a temporary internet file folder (hereinafter referred to as "cache" or "unallocated space") constitutes "control" of child pornography sufficient to support a conviction under 18 Pa.C.S. § 6312(d).

A. Proceedings at Trial

On November 20, 2003, Diodoro's personal computer was seized from his residence. He was subsequently charged with 30 counts of Sexual Abuse of Children in violation of 18 Pa.C.S. § 6312(d) and one count of Criminal Use of a Communication Facility in violation of 18 Pa.C.S. § 7512(a).

At the conclusion of a two-day jury trial held on February 24 and 25, 2005, Diodoro was found guilty on all

counts. At trial, Pennsylvania State Trooper Peter J. Salerno (Tr. Salerno), who examined Diodoro's computer, testified that Diodoro accessed web pages pertaining to child pornography and that 370 images of suspected child pornography were stored in cache files or unallocated space of the hard drive. App. 3.

There was no evidence that Diodoro had taken any affirmative action with respect to the images. Diodoro only viewed the images. He did not print them, intentionally save them, or do anything other than just look at them on his computer screen. App. 43. Although the pornographic images were automatically saved to an internet cache file on the computer's hard drive, there was no evidence that Diodoro knew that the images were saved. The Commonwealth did not contend that Diodoro did anything but view the images on the screen. App. 43.

Tr. Salerno testified that finding the images that were stored in the cache files indicated only that someone

accessed the child pornography web sites, clicked the "next" button on the computer to access images and that it had taken a "fairly lengthy time" to go through the images. App. 3.

Diodoro and the Commonwealth also stipulated that:

> The thirty unlawful images located on the hard drive of Diodoro's computer depicted, pictured and showed female children engaged in prohibited sexual acts. Those acts include sexual intercourse, oral sexual intercourse and lewd exhibition of genitals.
>
> The second fact is that the thirty unlawful images were viewed by Diodoro on his computer while he was searching the World Wide Web for images of females under the age sixteen.

App. 4.

B. Appellate Proceedings

On June 21, 2005, Diodoro filed a Notice of Appeal to the Superior Court of Pennsylvania asserting, inter alia, that the evidence, including the presence of female children engaged in prohibited sexual acts in the cache files of Diodoro's computer and Diodoro's admission that he had been searching the internet to review images of females

under age sixteen, was insufficient to support Diodoro's conviction for knowing possession of child pornography in violation of 18 Pa.C.S. § 6312(d). App 5.

On December 29, 2005, the trial court issued an opinion finding that there was sufficient evidence to show that Diodoro knowingly controlled child pornography in violation of 18 Pa.C.S. § 6312(d). App. 71.

On November 2, 2006, the Superior Court of Pennsylvania issued an opinion reversing Diodoro's conviction finding that there was insufficient evidence to support Diodoro's conviction for knowing possession of child pornography under 18 Pa.C.S. § 6312(d). App. 58. The Superior Court rephrased the issue as whether merely viewing child pornography on the internet without intentionally saving or downloading any of the images constitutes "knowing possession" of child pornography under § 6312(d). App. 59.

The Superior Court reasoned that 18 Pa.C.S. § 6312(d) was ambiguous because the word "possession" was an ambiguous term when it comes to computer technology. App. 60. Specifically, the Superior Court stated "Because this is a penal statute with an ambiguous term when it comes to computer technology, it must be construed strictly and in favor of the defendant." App. 60. Further, the Superior Court stated "A defendant must have fair notice that his conduct is criminal. Because of the ambiguity, sufficient notice was not provided here. For this reason, we are constrained to reverse and leave it to the legislature to clarify the language if it intends to make the mere "viewing" of child pornography a crime." App. 60.

The Commonwealth filed a timely application for *en banc* reargument, which the Superior Court granted on January 10, 2007. The November 2, 2006 opinion was subsequently withdrawn. App. 35.

Before the *en banc* panel, Diodoro argued that merely viewing images of child pornography on a web site, without intentionally saving or downloading the images, does not constitute a crime under 18 Pa.C.S. § 6312(d). Further, Diodoro argued that 18 Pa.C.S. § 6312(d) did not define the criminal offense with sufficient definiteness that ordinary people could understand that merely viewing images of child pornography that have been posted on the world wide web was criminal conduct prohibited under 18 Pa.C.S. § 6312.

On August 23, 2007, the Superior Court *en banc* affirmed the judgment of sentence finding that there was sufficient evidence for the jury to find that Diodoro's conduct of accessing and viewing child pornography over the internet constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d). App. 33. The Superior Court did not reach the issue of whether Diodoro's action constituted "possession." App. 42, FN5.

In the dissenting opinion, Judge Klein asserted that the issue to be decided was: "Is there an ambiguity in the legislative definition of "possession or controls", such that interpreting it in the light most favorable to the accused, the mere viewing of child pornography on a computer screen is not a crime?" App. 43-44.

Judge Klein asserted that the statute should be interpreted in the light most favorable to the criminally accused because the statute is ambiguous. App. 44. Judge Klein reasoned that the statute is ambiguous because reasonable minds differ over whether merely accessing and viewing child pornography over the internet constitutes knowingly possessing or controlling these images. App. 46

Further, the dissent asserted that "Diodoro was not on fair notice that he was committing a crime by merely viewing the images, without doing something more." App. 46. The dissent disagreed with the majority's discussion of the definition of "control," which defined "control" as a

noun, instead of as a verb as it is used in the statute. App. 47. As a noun, "control" means the "ability to exercise a restraining or directing influence over something." As a verb, "control" means "to exercise restraining or directing influence over." App. 47-49. The dissent explained that there was no evidence that Diodoro exercised any directing influence over the images, e.g. by downloading, saving or printing them. App. 49.

The dissent concluded that, because there is a reasonable argument on both sides, "there is ambiguity and it is improper to base a criminal conviction on an ambiguous statute." App. 49. Finally, the dissent noted that this is a case of first impression in Pennsylvania and that other state and Federal courts are split on the question of whether the mere viewing of child pornography via the internet constitutes possession of such material. App. 49.

Diodoro filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania presenting the following question for review:

Do reasonable minds differ regarding whether accessing and viewing child pornography over the internet under the totality of the circumstances in this cases constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d)?

App. 12.

On December 24, 2007, the Supreme Court of Pennsylvania entered an Order granting the Petition for Allowance of Appeal and rephrasing for clarity the issue to be determined which was: "Whether accessing and viewing child pornography over the internet constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d)?" App. 32.

On May 26, 2009, the Supreme Court of Pennsylvania affirmed the judgment of sentence finding that merely accessing and viewing child pornography over the internet constituted "control" of such pornography under 18 Pa.C.S. § 6312(d). App. 1.

The Supreme Court of Pennsylvania focused on interpreting the statute "to give effect to all its provisions." App. 17. The Court found that the purpose of the statute was "to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography." App. 22. The Court reasoned that "control" means "to exercise power or influence over" and found that "an individual manifests such knowingly control of child pornography when he purposely searches it out on the internet and intentionally views it on his computer." App. 19.

Further, the Court opined that to interpret the statute differently would be to allow intentional and purposeful viewing of child pornography on the internet without consequences. App. 21. Implicit in the Court's determination is that the statute is unambiguous, such that an ordinary person of average intelligence would be on notice that his conduct in accessing and viewing child

pornography on the internet would be a crime, and that the statute need not be construed in favor of the criminally accused. App. 19-21.

Diodoro now timely seeks a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania. 18 Pa.C.S. § 6312(d) is ambiguous and should have been construed by the Court in the light most favorable to the accused.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Supreme Court of Pennsylvania has decided Diodoro's case, which involves the determination of an important federal question, in a way that conflicts with the decisions of the United States Courts of Appeals for the 8th and 9th Circuits.

This petition presents a question of law upon which the courts are divided: Whether merely accessing and viewing child pornography on the internet, without taking affirmative acts to download, save or retrieve temporary

internet file folders (cache) where the images are automatically saved, is sufficient to support a conviction under a statute which makes it a crime to "possess or control" child pornography. Necessary to this determination is whether a statute such as 18 Pa.C.S. § 6312(d), which makes it a crime to "possess or control" child pornography, provides a person of ordinary intelligence fair notice that merely accessing and viewing images on the internet is a crime.

It is a fundamental principle of due process that a criminal statute must give a person of ordinary intelligence fair notice that his contemplated conduct constitutes a crime. United States v. Sullivan, 332 U.S. 689, 68 S.Ct. 331, 92 L.Ed. 297 (1948). A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited. Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000).

Under Pennsylvania law, statutes should be construed to effectuate the intention of the Pennsylvania legislature, but the Pennsylvania legislature does not intend to violate the United States Constitution. 1 Pa.C.S. § 1928(b). Penal statutes must be strictly construed. 1 Pa.C.S. § 1922. Where a term in a penal provision is ambiguous, that term should be interpreted in the light most favorable to the accused. Commonwealth v. McClintic, 909 A.2d 1241, 1246, 589 Pa. 465 (Pa. 2006).

The Supreme Court of Pennsylvania focused on interpreting the statute to effectuate the intent of the legislature – to protect children, end abuse and exploitation of children, and eradicate the production and supply of child pornography. However, the question is not whether viewing child pornography over the internet is the same evil sought to be eradicated by the statute or whether the legislature has the power to punish viewing child pornography on the internet. Rather, the question is

whether the conduct of merely accessing and viewing child pornography violates 18 Pa.C.S. § 6312(d) as it is written. It does not.

18 Pa.C.S. § 6312(d) is ambiguous because it does not contain a definition of the word "control" with respect to computer depictions. Reasonable minds differ on whether merely accessing and viewing child pornography on the internet, without some other affirmative action, constitutes "control" of child pornography. As such, the Supreme Court of Pennsylvania should have construed the statute in the light most favorable to the criminally accused.

The interpretation of the statute by the Supreme Court of Pennsylvania, which was not construed in favor of Diodoro, fails to provide a person of ordinary intelligence fair notice that merely accessing and viewing child pornography on the internet is a crime in the Commonwealth of Pennsylvania is violation of the Due Process Clause of the United States Constitution.

Federal courts have rendered decisions which conflict with the decision of the Supreme Court of Pennsylvania. These courts have held that mere viewing of child pornography does not constitute knowing possession. United States v. Perez, 247 F.Supp.2d 459, 484, n. 12 (S.D.N.Y. 2003) citing United States v. Zimmerman, 277 F.3d 426, 435 (3d. Cir. 2002). See United States v. Stulock, 308 F.3d 922, 925 (8th Cir. 2002), noting that the District Court acquitted Stulock of possession of child pornography located on the internet cache file and explained "one cannot be guilty of possession for simply having viewed an image on a web site thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image."

The Federal courts have specifically found that there can be no possession where the defendant is unaware that the images have been saved in the cache files, absent some evidence that the defendant was aware that those files

existed. See United States v. Kuchinski, 469 F.3d 853, 863 (9th Cir. 2006), United States v. Romm, 455 F.3d 990, 998 (9th Cir. 2006), cert. denied, Romm v. United States, 127 S.Ct. 1024 (2007) ("To possess images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession.")

In United States v. Tucker, 305 F.3d 1193 (10th Cir. 2002), the Tenth Circuit upheld a conviction for possession where the defendant knew that the images he viewed on the internet would be saved on his hard drive and he intentionally deleted them after each computer session.

Additionally, several state appellate courts have upheld possession of child pornography only where there was evidence that the defendant had intentionally saved or downloaded the images. See, e.g., Krause v. State, 243 S.W.3d 95, 2007 WL 2004940 (Tex.App.2007) (upholding conviction where evidence showed that images of child

pornography had been deliberately saved to external devices such as compact disks and hard drive); State v. Mobley, 129 Wash.App. 378, 118 P.3d 413 (2005) (upholding conviction where there was sufficient evidence that defendant sought out and controlled pornographic images by downloading and/or saving them on his computer), app. denied, 157 Wash.2d 1002, 136 P.3d 758 (2006); Kromer v. Commonwealth, 45 Va.App. 812, 613 S.E.2d 871 (2005) (upholding conviction where evidence showed that defendant downloaded and saved images onto computer and desktop shortcut indicated that he manipulated them to be easily accessible and continuously available); State v. Lindgren, 275 Wis.2d 851, 687 N.W.2d 60 (App.2004) (upholding conviction where defendant repeatedly visited child pornography websites, clicked on thumbnail images to create larger pictures for viewing, and saved at least one image to his personal folder).

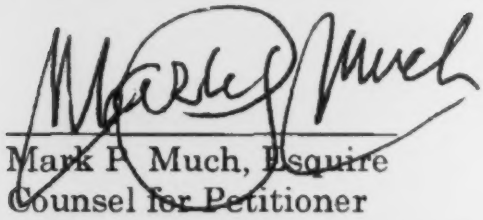
A Georgia appellate court decision reversed a defendant's conviction for possession of child pornography where the defendant only viewed pictures on his computer screen. See Barton v. State, 286 Ga.App. 49, 648 S.E.2d 660 (2007).

In Diodoro's case, the Supreme Court of Pennsylvania has construed 18 Pa.C.S. § 6312(d) so that Diodoro's due process rights have not been satisfied. The statute is ambiguous because it fails to adequately define "control" with respect to computer depictions and fails to provide reasonable standards by which a person may gauge their future conduct. Papchristou v. Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d (1972). The Supreme Court of Pennsylvania has decided this issue, which involves the determination of an important federal question, in a way that conflicts with the decisions of the United States Courts of Appeals for the 8th and 9th Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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In the Supreme Court of Pennsylvania
Middle District
Castille, C.J., Saylor, Eakin, Baer, Todd, McCaffery, JJ.

Commonwealth of Pennsylvania, Appellee,	:	No. 117 MAP 2007
	:	Appeal from the order of
v.	:	the Superior Court, entered
Anthony Diodoro, Appellant.	:	August 23, 2007, at No. 1889 EDA 2005, affirming Judgment of Sentence of the Court of Common Pleas of Delaware County, entered May 23, 2005, at No. 2200-04
	:	932 A.2d 172 (Pa. Super. 2007)
	:	ARGUED: May 14, 2008

OPINION

MR. CHIEF JUSTICE CASTILLE Decided: May 26, 2009

In the instant appeal, the limited question presented for this Court's review is whether accessing and viewing child pornography over the internet constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d). For the reasons that follow, we hold that it does, and accordingly, we affirm the order of the Superior Court.

On or about November 20, 2003, the Ridley Township Police Department obtained a search warrant for appellant Anthony Diodoro's personal computer and seized the computer from his residence in Delaware County. Following forensic examination of appellant's computer, it was determined that the computer contained approximately 340 images of suspected child pornography and thirty additional images that were known to be child pornography. Consequently, appellant was arrested and charged with thirty counts of Sexual Abuse of Children in violation of 18 Pa.C.S. § 6312(d) FN1 and one count of Criminal Use of a Communication Facility in violation of 18 Pa.C.S. § 7512(a).FN2

At a jury trial occurring on February 24 and 25, 2005, held before the Honorable Joseph P. Cronin, Jr., the Commonwealth's computer forensics expert, Pennsylvania State Trooper Peter J. Salerno, testified to the specifics of his forensic examination of appellant's computer. Trooper

Salerno explained that he searched the images and web history on appellant's hard drive using forensic software, which revealed, inter alia, web pages pertaining to child pornography websites, and 370 images relating to child pornography that were stored in the cache files or unallocated space of the hard drive. Notes of Testimony, 2/24/05, at 223, 229. Trooper Salerno testified that finding the images of child pornography stored in the cache files indicated that someone accessed the child pornography websites and by clicking the "next" button or a specific image, accessed and viewed the various images. Id. at 230-31. Trooper Salerno also noted that because of the large quantity of images stored in the cache files, it would have taken an individual a considerable amount of time to go through the images. Id. at 248. Furthermore, appellant and the Commonwealth stipulated as follows:

> The [thirty] unlawful images located on the hard drive of [appellant's] computer depicted, pictured and showed female children engaged in prohibited sexual acts. Those

acts include sexual intercourse, oral sexual intercourse and lewd exhibition of genitals.

The second fact is that the [thirty] unlawful images were viewed by [appellant] on his computer while he was searching the World Wide Web for images of females under age sixteen.

Id. at 250-51.

A jury convicted appellant of all counts charged. On May 23, 2005, the trial court sentenced appellant to an aggregate term of nine to twenty-three months of imprisonment, followed by five years' probation. Additionally, appellant was required to submit to DNA testing and was prohibited from: (1) having unsupervised use of a computer; (2) having unsupervised contact with children under the age of eighteen; and (3) using drugs or alcohol.

On June 21, 2005, appellant filed a notice of appeal and a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P.1925(b). In his Rule 1925(b) statement, appellant challenged the sufficiency of evidence

with respect to each of the two offenses for which he was convicted. The statement read, in its entirety, as follows:

> The matters being complained of on appeal are as follows:
>
> 1. The evidence, including the presence of images of female children engaged in prohibited sexual acts in the cache files of [appellant's] computer and [appellant's] admission that he had been searching the internet to view images of females under age [sixteen], was insufficient to support [appellant's] conviction for knowing possession of child pornography in violation of 18 Pa.C.S. § 6312(d).
>
> 2. The evidence, including the presence of images of female children engaged in prohibited sexual acts in the cache files of [appellant's] computer and [appellant's] admission that he had been searching the internet to view images of females under age [sixteen], was insufficient to support [appellant's] conviction for criminal use of a communication facility in violation of 18 Pa.C.S.[§ 7512(a)].

Appellant's Rule 1925(b) Concise Statement of Matters Complained of on Appeal, 6/21/05, at 1-2.

In its Rule 1925(a) opinion, the trial court explained that appellant's judgment of sentence should be affirmed because the evidence was sufficient to support his convictions under both Section 6312(d) and Section

7512(a). The court found that the appellant-Commonwealth stipulation and Trooper Salerno's testimony proved that at various times, appellant knowingly controlled child pornography in violation of Section 6312(d) and that he utilized a communication facility (his computer) to do so in violation of Section 7512(a).

In his brief to the Superior Court, appellant raised the following issues:

Was the evidence, including the presence of images of female children engaged in prohibited sexual acts in the cache files of [appellant's] computer and [appellant's] admission that he had been searching the internet to view images of females under age [sixteen], sufficient to support [appellant's] conviction for knowing possession of child pornography in violation of 18 Pa.C.S. § 6312(d)?

Was the evidence, including the presence of images of female children engaged in prohibited sexual acts in the cache files of [appellant's] computer and [appellant's] admission that he had been searching the internet to view images of females under age [sixteen], sufficient to support [appellant's] conviction for criminal use of a communication facility in violation of 18 Pa.C.S.[ ] § 7512(a)?

Appellant's Super. Ct. Brief, 4/24/06, at 2. On November 2, 2006, a panel of the Superior Court issued a published opinion. After finding that the evidence was insufficient to support appellant's convictions for knowing possession of child pornography under Section 6312(d) and criminal use of a communication facility under Section 7512(a), the panel reversed appellant's judgment of sentence. The Commonwealth then filed a timely application for en banc reargument, which the Superior Court granted on January 10, 2007. The November 2, 2006 panel opinion was subsequently withdrawn.

Before the en banc panel, appellant raised the following question for review:

> Was the evidence consisting of images of female children engaged in prohibited sexual acts that had been automatically saved to an internet cache file on the [ ] hard drive of [ ] appellant's computer and [ ] appellant's admission that he had been searching the internet to view images of females under age [sixteen] sufficient to support appellant's conviction for knowing possession of child pornography in violation of 18 Pa.C.S. § 6312(d) and for

criminal use of a communication facility in violation of 18 Pa.C.S.[ ] § 7512(a)?

Appellant's (Substituted) Super. Ct. Brief, 2/6/07, at 2. On August 23, 2007, a majority of the Superior Court en banc panel affirmed the trial court's judgment of sentence for both convictions in a published opinion. Commonwealth v. Diodoro, 932 A.2d 172 (Pa.Super.2007). The majority focused its discussion and analysis of Section 6312(d) and appellant's actions on the term "control" as utilized in the statute. The majority determined that the "ordinary, everyday meaning" of the term "control" was: "[t]o exercise restraining or directing influence over.... The ability to exercise a restraining or directing influence over something." Diodoro, 932 A.2d at 174 (citing Black's Law Dictionary 329 (6th ed.1990)). The majority then held that, in addition to appellant intentionally seeking out and viewing child pornography, "[h]is actions of operating the computer mouse, locating the [websites], opening the sites,

displaying the images on his computer screen," at which time he had the ability to download, print, copy or e-mail the images, "and then closing the sites were affirmative steps and corroborated his interest and intent to exercise influence over, and, thereby, control over the child pornography." Id. The majority found additional evidence of appellant's control of child pornography based upon Officer Salerno's testimony, wherein he explained that the sheer volume of child pornography stored in appellant's "cache files indicate[d] that someone, after accessing the particular [websites], had to click the 'next' button on the screen to view successive images." Id. Thus, the majority concluded that the totality of the circumstances was sufficient to support the jury finding that appellant's conduct constituted knowing control of child pornography under Section 6312(d). Id. at 175. Because the court held that appellant controlled the images of child pornography, it declined to reach the issue of whether appellant's actions

constituted possession of child pornography. Id. at n. 5.FN3

Judge Klein filed a dissenting opinion, which was joined by Judge Bender. The dissent did not address the sufficiency claim actually raised. Indeed, the dissent reframed the Section 6312(d) question to focus on whether there was ambiguity in the "possesses or controls" language of Section 6312(d) such that the mere viewing of child pornography on the internet is not a crime. Id. at 175 (Klein, J., dissenting). The dissent argued that Section 6312(d) was ambiguous because reasonable minds can differ over the issue presented for review and reasonable arguments can be made that appellant did not knowingly control child pornography. Id. at 176. The dissent concluded that when the statute is construed strictly in favor of appellant, he was not given fair notice that simple viewing of child pornography via the internet violated Section 6312(d). Id. Further, the dissent took issue with

the majority's discussion of the definition of the term "control" and argued that if it had applied the definition of the verb "control," "there was no evidence that [appellant] exercised any directing influence," over the images of child pornography "on his computer screen, e.g., by downloading, saving, or printing them." Id. at 177. Thus, the dissent concluded that while appellant may "have had the ability to 'control' the images" of child pornography by downloading, saving or printing them, "he did not exercise his potential control over them." Id. at 176. Finally, the dissent noted that other state and federal courts are split on the question of whether the mere viewing of child pornography via the internet constitutes possession of such material and included a discussion of cases relevant to that point.

Appellant petitioned this Court for allowance of appeal, taking issue with the Superior Court's finding that he had control of the images for purposes of Section

6312(d). He presented the following single question for review:

Do reasonable minds differ regarding whether accessing and viewing child pornography over the interest [sic] under the totality of the circumstances in this case constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d)?

Appellant's Petition for Allowance of Appeal at 2. This Court rephrased the issue for clarity and granted review of the following question: "[w]hether accessing and viewing child pornography over the internet constitutes 'control' of such pornography under 18 Pa.C .S. § 6312(d)?" Commonwealth v. Diodoro, 595 Pa. 537, 939 A.2d 290 (Pa.2007) .FN4 This issue presented for review is a question of law involving statutory construction. Accordingly, our scope of review is plenary and our standard of review is de novo. Fitzpatrick v. Natter, 599 Pa. 465, 961 A.2d 1229, 1236 (Pa.2008); Castellani v. Scranton Times, L.P., 598 Pa. 283, 956 A.2d 937, 943 (Pa.2008).

Appellant argues that the evidence was insufficient to prove that he illegally controlled child pornography. Appellant maintains that the corpus delecti of the crime he claims he was convicted of----possession of child pornography----were the files depicting child pornography found in the cache files of his computer. Appellant asserts that in order for the Commonwealth to establish that he had the power and intent to exercise control over the images of child pornography found on his computer, the Commonwealth was required to prove that he had knowledge of the existence of those images on his computer. Appellant contends that under the Commonwealth's theory of the case---that appellant's accessing and viewing of child pornography over the internet violated Section 6312(d)----the unlawful control occurred before appellant even knew he possessed the child pornography, i.e., before appellant's interpretation of what constituted the corpus delecti of the crime.FN5

Appellant further contends that it is the responsibility of the General Assembly, in legislating in this area, to enact a statute which provides fair notice that the viewing of child pornography constitutes a violation of Section 6312. Appellant argues that the General Assembly could have included specific language which made the mere viewing of child pornography via the internet illegal, but notes that it did not do so. Appellant then notes that the Pennsylvania House of Representatives considered a bill in March 2007 which sought to amend Section 6312 to include language which would make it illegal to intentionally view child pornography. From this fact, appellant argues that the members of the House of Representatives did not intend for the current version of Section 6312 to prohibit mere viewing of child pornography. FN6

The Commonwealth argues that the evidence was sufficient to prove beyond a reasonable doubt that appellant was guilty of sexual abuse of children under Section 6312(d) because he admitted that he intentionally searched for and purposefully viewed child pornography, thus establishing that he knowingly controlled images of child pornography. Specifically, the Commonwealth asserts that appellant's knowing control of the images of child pornography was manifested when he clicked on and viewed the individual images. The Commonwealth notes that appellant clicked on hyperlinks to access sites which contained child pornography and that appellant had to affirmatively click on the command "next page" to access each new page within certain websites and/or affirmatively click on individual images of child pornography to access such material. Moreover, the Commonwealth posits that because appellant possessed the ability to copy, save, manipulate, print and e-mail the images of child

pornography that were on his computer screen, he knowingly controlled the images.

Additionally, the Commonwealth maintains that appellant need not have saved the images of child pornography or known that the images were automatically saved to his hard drive to have violated Section 6312(d) because it is a crime to simply knowingly control images of child pornography. The Commonwealth maintains that the General Assembly did not intend for a restrictive interpretation of the term "control" which would require a defendant to save an image of child pornography to knowingly control the image. The Commonwealth also rebuts appellant's argument concerning subsequent consideration by the Pennsylvania House of Representatives by noting that the bill he cites was proposed in direct response to the now-withdrawn initial Superior Court panel opinion.

The Commonwealth further argues that the purpose of Section 6312 is to protect children from exploitation, and therefore, if images of child pornography may be intentionally sought out and purposefully viewed without consequence, the purpose of the statute will be circumvented and the child pornography market will grow. The Commonwealth asserts that Section 6312(d) should not be read to protect individuals who knowingly seek out and view child pornography on the internet.

It is well-settled that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly," 1 Pa.C.S. § 1921(a), and that the plain language of the statute is generally the best indicator of such intent, Commonwealth v. Daniels, 963 A.2d 409, 417 (Pa.2009). When ascertaining the intent of the General Assembly, there is a presumption that the General Assembly "does not intend a result that is absurd, impossible of execution

or unreasonable" when enacting legislation. 1 Pa.C.S. § 1922(1); HSP Gaming, L.P. v. City of Philadelphia, 598 Pa. 118, 954 A.2d 1156, 1172 (Pa.2008) (quoting HSP Gaming, L.P. v. City Council, 595 Pa. 508, 939 A.2d 273, 280 (Pa.2007)). Furthermore, the words of a statute "shall be construed according to rules of grammar and according to their common and approved usage ." 1 Pa.C.S. § 1903(a); Day v. Civil Serv. Comm'n of Borough of Carlisle, 593 Pa. 448, 931 A.2d 646, 652 (Pa.2007). "Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S. § 1921(a); Commonwealth v. McCoy, 599 Pa. 599, 962 A.2d 1160, 1167-68 (Pa.2009). We will only look beyond the plain meaning of the statute where the words of the statute are unclear or ambiguous. 1 Pa.C.S. § 1921(c); Upper Southampton Twp. v. Upper Southampton Twp. Zoning Hearing Bd., 594 Pa. 58, 934 A.2d 1162, 1167 (Pa.2007).

With these principles in mind, we turn to an examination of Section 6312(d), which provides in relevant part:

> Any person who knowingly **possesses or controls** any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

18 Pa.C.S. § 6312(d)(1) (emphasis added). Thus, under Section 6312(d), a defendant may be convicted of sexual abuse of children for the mere knowing control of child pornography.

Because Section 6312 does not include a definition of the term "control," the common usage and definition of the word governs. The verb control is commonly defined as: "[t]o exercise power or influence over[.]" Black's Law Dictionary 353 (8th ed.2004). An individual manifests such knowing control of child pornography when he purposefully searches it out on the internet and intentionally views it on his computer. As the testimony in

this case showed, in such a situation, the viewer has affirmatively clicked on images of child pornography from different websites and the images are therefore purposefully on the computer screen before the viewer. Such conduct is clearly exercising power and/or influence over the separate images of child pornography because the viewer may, inter alia, manipulate, download, copy, print, save or e-mail the images. It is of no import whether an individual actually partakes in such conduct or lacks the intent to partake in such activity because intentionally seeking out child pornography and purposefully making it appear on the computer screen···for however long the defendant elects to view the image···itself constitutes knowing control. The use and operation of computers are not the novelty they once were. Control via a computer is little different from the control one exercises by viewing a book or a magazine···whether one purchases the tangible image or not. It is clear that Section 6312(d) should not

and cannot be read to allow intentional and purposeful viewing of child pornography on the internet without consequence.

The parties appear to agree that, if an individual were to, inter alia, download, save or print an image of child pornography from the internet, or knew of the existence of the images of child pornography on his computer hard drive, those actions or that knowledge would constitute knowing possession of such material-also illegal under Section 6312(d). However, under the statute, the Commonwealth need not establish that a defendant possessed child pornography to prove a violation of Section 6312(d) if the Commonwealth can prove that a defendant knowingly controlled child pornography; the statute employs the disjunctive "knowingly possesses or controls," 18 Pa.C.S. § 6312(d)(1) (emphasis added). It is reasonable to conclude that the General Assembly employed the terms "possession" and "control" in the disjunctive purposefully

and that they were meant to have different applications. It would be nonsensical to assume that it was the intention of the General Assembly to have utilized two terms "possession" and "control" interchangeably. A contrary interpretation would be absurd and lead to unreasonable results a gigantic loophole in the statute, never intended by the General Assembly, that would allow individuals to intentionally access and view child pornography via the internet with impunity, which would make the statute toothless.

Such a reading would also allow the purpose of this anti-child pornography legislation to be circumvented and the child pornography market to grow. We explained in Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198, 215 (Pa.2007), that "[t]he purpose of Section 6312 is plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography." The "control" language of Section 6312(d)

comports with the compelling state interests of protecting children from sexual exploitation and seeking to curtail the production and trafficking of child pornography, which necessarily involves such exploitation.

Finally, the fact that individual representatives in the General Assembly may have proposed amendments to Section 6312 does not undermine our conclusion. First, as the Commonwealth notes, that proposal may well have been in reaction to the initial panel decision below. Second, and more fundamentally, the legislative actions of a later General Assembly are not probative of the legislative intent of a prior General Assembly. "[T]he plain language of the statute and statutory construct that existed when legislation was enacted are controlling." HSP Gaming, L.P. v. City of Philadelphia, 598 Pa. 118, 954 A.2d 1156, 1182 (Pa.2008). "[A]rguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a

footnote." Sphere Drake Ins. Co. v. Phila. Gas Works, 782 A.2d 510, 517 (Pa.2001) (quoting Sullivan v. Finkelstein, 496 U.S. 617, 632, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring)). Thus, appellant's speculative argument---that the House of Representatives did not intend the current version of Section 6312 to prohibit the intentional viewing of child pornography because the House considered a bill that sought such an amendment more explicitly-fails.

For the foregoing reasons, we hold that accessing and viewing child pornography over the internet constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d). Accordingly, we affirm the order of the Superior Court.

Justice TODD and Justice McCAFFERY did not participate in the consideration or decision of this matter. Justice SAYLOR, EAKIN and BAER join the opinion. FN1. Section 6312(d)(1) provides that it is illegal for an

individual to knowingly possess or control "any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act[.]" 18 Pa.C.S. § 6312(d)(1).

FN2. Under Section 7512:

> [a] person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No. 64), [35 P.S. § 780-101 et seq.], known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

18 Pa.C.S. § 7512(a).

FN3. The majority further determined that, because the evidence was sufficient to support appellant's conviction for control of child pornography, the evidence also supported appellant's conviction for criminal use of a communication facility under Section 7512(a). Diodoro, 932 A.2d at 175.

FN4. Although this is not the same issue that appellant presented to the Superior Court, it is properly preserved because the Superior Court decided the appeal premised upon this alternative avenue. Appellant does not dispute the propriety of the Superior Court passing upon the disjunctive manner of satisfying the statute. FN5. Perhaps influenced by the reasoning in the dissent below, appellant confuses his sufficiency claim by also appearing to argue that Section 6312(d) is unconstitutionally vague. After briefly setting forth the constitutional vagueness standard, appellant notes that Section 6312 does not include a definition of the term "control." Therefore, he asserts, reasonable minds, including those of the Superior Court en banc panel, may differ as to what conduct is prohibited under the statute, and appellant was thus not given fair notice of the statutorily prohibited conduct. Specifically, appellant contends that the statute is not clear that intentionally

accessing and viewing child pornography via the internet--sans the intent to download, copy or send the images---- constitutes "control" of such material under Section 6312(d). Citing Section 1928(b) of the Statutory Construction Act, 1 Pa.C.S. § 1928(b) (directing that penal provisions are to be strictly construed) and Commonwealth v. McClintic, 589 Pa. 465, 909 A.2d 1241, 1246 (Pa.2006) (noting that ambiguity in penal statutes is to be interpreted in favor of defendants), appellant maintains that the term "control" as utilized in Section 6312(d) is ambiguous and, therefore, that it should be strictly construed in his favor.

As our above description of appellant's Rule 1925(b) statement and his Superior Court brief makes clear, the only two issues appellant raised below were challenges to the sufficiency of the evidence with respect to each of the two offenses of which he was convicted. Appellant did not allege any constitutional violation, nor did he challenge

the constitutionality of either statute. Moreover, neither the trial court's opinion nor the majority opinion of the en banc panel of the Superior Court addressed the vagueness argument that appellant now attempts to raise, or any other constitutional challenge to Section 6312. Therefore, appellant's claim that Section 6312(d) is unconstitutionally vague is waived. See Pa.R.A.P. 302(a); see also Commonwealth v. Castillo, 585 Pa. 395, 888 A.2d 775, 780 (Pa.2005) ("Any issues not raised in a Pa.R.A.P.1925(b) statement will be deemed waived.") (quoting Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306, 309 (Pa.1998)); Commonwealth v. Bavusa, 574 Pa. 620, 832 A.2d 1042, 1051-52 (Pa.2003) (deeming constitutional challenges waived where appellant had preserved only statutory interpretation issue) ("If appellant had a constitutional objection to the statute ..., he was obliged to specifically forward it below."). Any constitutional issue is independently waived because it was not within the scope

of this Court's grant of review. See Commonwealth v. Revere, 585 Pa. 262, 888 A.2d 694, 700 n. 8 (Pa.2005); Commonwealth v. Travers, 564 Pa. 362, 768 A.2d 845, 846 n. 1 (Pa.2001); Commonwealth v. Glass, 562 Pa. 187, 754 A.2d 655, 658 n. 2 (Pa.2000); Commonwealth v. Davis, 543 Pa. 628, 674 A.2d 214, 216 n. 6 (Pa.1996) (citing Pa.R.A.P. 1115(a)(3)); Commonwealth v. Rush, 522 Pa. 379, 562 A.2d 285, 288 (Pa.1989).

It is worth noting that Rule 1925(b) has since been amended to specify, in relevant part: "Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court...." Pa.R.A.P.1925(b)(4)(v) (amended May 10, 2007, effective July 25, 2007). Although the amended version of the Rule does not apply to appellant's case, we note that the subsection just quoted further provides that "this provision does not in any way limit the obligation of a

criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal." Id.

Of course, the fact that appellant waived a stand-alone constitutional claim does not alter the fact that we must strictly construe Section 6312(d) because it is a penal statute.

FN6. Appellant also argues that the evidence was insufficient to establish the crime of knowing possession of child pornography in violation of Section 6312 and further notes that federal and other state courts, construing other statutes, have differed on the question of whether the mere viewing of child pornography constitutes possession of child pornography.

The Commonwealth also argues that appellant was properly convicted under the theory of constructive possession. To bolster this argument, the Commonwealth includes a brief discussion of three cases from other states which address the issue of possession and/or constructive

possession of child pornography. Furthermore, the Commonwealth includes a discussion of federal case law concerning violations of 18 U.S.C. § 2252A which, inter alia, prohibits the knowing possession of child pornography at the federal level. Section 2252A does not prohibit the "control" of child pornography as in Section 6312(d).

Because this Court granted review solely on the question of whether accessing and viewing child pornography over the internet constitutes control of such pornography under Section 6312(d), arguments made by both appellant and the Commonwealth addressing whether such conduct constitutes possession of child pornography under Section 6312(d) are not considered. See, e.g., Revere, 888 A.2d at 700 n. 8 (cited in Footnote 5, supra).

In the Supreme Court of Pennsylvania
Middle District

Commonwealth of Pennsylvania, Respondent,	:	No. 729 MAL 2007
v.	:	Petition for Allowance of Appeal from the Order of the Supreme Court
Anthony Diodoro, Petitioner.	:	

ORDER

PER CURIAM.

AND NOW, this 24th day of December, 2007, the Petition for Allowance of Appeal is GRANTED. The issue, rephrased for clarity, is:

Whether accessing and viewing child pornography over the internet constitutes "control" of such pornography under 18 Pa.C.S. § 6312(d)?

TRUE & CORRECT COPY
ATTEST: December 24, 2007

/s/
Norina K. Blynn, Chief Clerk

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, APPELLEE, v.	:	
ANTHONY DIODORO, APPELLANT.	:	No. 1889 EDA 2005

BEFORE: JOYCE*, STEVENS, LALLY-GREEN, TODD, KELIN, BENDER, GANTMAN, McCAFFERY AND PANELLA, JJ.

*This decision was reached prior to August 17, 2007 with Judge Joyce's participation.

OPINION BY STEVENS, J.: Filed: August 23, 2007

This is an appeal from the judgment of sentence entered by the Court of Common Pleas of Delaware County on May 23, 2005, following Appellant's conviction by a jury of thirty (30) counts of sexual abuse of children for possessing child pornography (FN1) and one (1) count of criminal use of a communication facility.(FN2) In this case of first impression, Appellant challenges the

sufficiency of the evidence in support of the jury verdicts. We affirm the judgment of sentence.

FN1. 18 Pa.C.S.A. § 6312(d).

FN2. 18 Pa.C.S.A. § 7512(a).

On or about November 20, 2003, pursuant to a search warrant for Appellant's personal computer, members of the Ridley Township Police Department seized the computer from Appellant's residence. Following forensic examination of the computer, it was found to contain three hundred seventy (370) photographs of suspected child pornography, thirty (30) of which were known to be child pornography. Appellant was arrested and charged with the aforementioned offenses and, following a jury trial, was convicted thereof. On May 23, 2005, Appellant was sentenced, inter alia, to an aggregate nine (9) to twenty-three (23) month term of imprisonment, to be followed by a five (5) year term of probation.

Appellant filed an appeal challenging the sufficiency of the evidence.

On November 2, 2006, a panel of this Court issued an opinion in which it found that the evidence was insufficient to sustain his conviction for knowing possession of child pornography under 18 Pa.C.S.A. § 6312(d) and criminal use of a communication facility under 18 Pa.C.S.A. § 7512(a). The Commonwealth filed a timely application for en banc reargument, which was granted on January 10, 2007, and the November 2, 2006 opinion was then withdrawn. We now affirm the judgment of sentence.

As to a challenge to the sufficiency of the evidence, we must determine:

> whether the evidence at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict[-]winner, are sufficient to establish all elements of the offense beyond a reasonable doubt. We may not weigh the evidence or substitute our judgment for that of the fact-finder. Additionally, the evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a defendant's guilt unless the evidence is so weak and inconclusive that as a matter of

law no facts supporting a finding of guilt may be drawn. The fact-finder, when evaluating the credibility and weight of the evidence, is free to believe all, part, or none of the evidence.

Commonwealth v. Stevenson, 894 A.2d 759, 773 (Pa.Super.2006) (citations and quotations omitted).

¶ 5 Pursuant to 18 Pa.C.S.A. § 6312, Sexual Abuse of Children, subsection 6312(d), Possession of Child Pornography:

Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act is guilty of a felony of the third degree.

18 Pa.C.S.A. § 6312(d) (emphasis added).

Criminal use of a communication facility is defined in 18 Pa.C.S.A. § 7512, which provides that:

A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title....

18 Pa.C.S.A. § 7512(a).

With regard to § 6312, the Commonwealth must prove the following three (3) elements beyond a reasonable doubt in order to convict an individual of this offense: there must be a depiction of an actual child engaged in a prohibited sexual act or a simulated sexual act; the child depicted must be under the age of eighteen (18); and the defendant must have knowingly possessed or controlled the depiction. Commonwealth v. Koehler, 914 A.2d 427, 436 (Pa.Super.2006).

At trial, the parties stipulated that:

> The 30 unlawful images located on the hard drive of [Appellant's] computer depicted, pictured and showed female children engaged in prohibited sexual acts. Those acts include sexual intercourse, oral sexual intercourse, and lewd exhibition of the genitals.
>
> The second fact is that the 30 unlawful images were viewed by [Appellant] on his computer while he was searching the World Wide Web for images of females under age 16.

N.T. 2/24/05 at 250-251.

Because Appellant admitted to knowingly accessing Web sites containing images of child pornography, and to

viewing those images on his computer, the remaining issue before us is whether the evidence proved that Appellant knowingly possessed or controlled the thirty (30) images in question within the purview of § 6312(d). Appellant asserts that he neither saved nor downloaded child pornography, but instead, merely viewed the images. He contends that his actions did not constitute possession of the material pursuant to § 6312(d). He adds that the presence of the pornographic images in the internet cache file, absent evidence that he knew that the images would be automatically saved to that file, did not satisfy the possession dictates of § 6312(d).(FN3) Finally, Appellant claims that his use of a computer to view pornographic images on a Web site, without having knowingly saved or downloaded the images or paid a fee to view the site, did not constitute the crime of criminal use of a communication facility under § 7512.

FN3. The Commonwealth presented the testimony of Pennsylvania State Police Officer Peter J. Salerno, a computer forensics expert, who testified, inter alia, that when a Web site is viewed, the image is automatically saved to an internet cache file. N.T. 2/24/05 at 248-249. Temporary internet files are stored in the cache, "a storage mechanism designed to speed up the loading of internet displays." 19 Berkeley Tech L.J. 1227, 1229 (Fall 2004). We focus our discussion and analysis of § 6312 and Appellant's actions on the term "control," and, in doing so, we are guided by its ordinary, everyday meaning. Control means, inter alia, "[t]o exercise restraining or directing influence over.... The ability to exercise a restraining or directing influence over something." Black's Law Dictionary 329 (6th ed.1990).

Herein, Appellant intentionally sought out and viewed child pornography. His actions of operating the computer mouse, locating the Web sites, opening the sites,

displaying the images on his computer screen, and then closing the sites were affirmative steps and corroborated his interest and intent to exercise influence over, and, thereby, control over the child pornography. (FN4) Cf. Commonwealth v. Armstead, 452 Pa. 49, 305 A.2d 1 (1973) (A showing that a defendant was aware of the presence of the article that constitutes contraband establishes an intent to exercise control over such contraband). Moreover, further evidence of Appellant's control over the images was born out by the testimony of Officer Salerno, who stated that the fact that multiple images were stored in the cache files indicates that someone, after accessing the particular Web sites, had to click the "next" button on the screen to view successive images. N.T. 2/24/05 at 230-231. Finally, while Appellant was viewing the pornography, he had the ability to download the images, print them, copy them, or email them to others, which we find is further evidence of control.

FN4. We note that determining whether an individual sought and controlled pornographic images of children recognizes and promotes the purposes behind such statutes; namely, the destruction of the market for the exploitative use of children, Osborne v. Ohio, 495 U.S. 103, 109, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), and, in turn, the protection of the physical and psychological well-being of children. New York v. Ferber, 458 U.S. 747, 756, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

The totality of the circumstances was sufficient for the jury to find that Appellant's conduct of accessing and viewing child pornography over the internet constituted "control" of such pornography under § 6312. (FN5) Because the evidence was sufficient to find Appellant guilty of possession of child pornography, the evidence also supported a finding that he was guilty of criminal use of a communication facility.(FN6)

FN5. Having determined that Appellant controlled the pornographic images in question, we need not reach the issue of whether his actions of accessing and viewing the images constituted possession thereof.

FN6. As indicated above, it was stipulated that Appellant viewed the unlawful images on his computer.

Based on the foregoing, we affirm the judgment of sentence.

Affirmed.

KLEIN, J., files a dissenting opinion in which BENDER, J. joins.

DISSENTING OPINION BY KLEIN, J.:

The facts in this case are undisputed. Anthony Diodoro used his home computer to intentionally visit websites to find child pornography and, in fact, viewed 30 screens depicting pornographic images of children. But Diodoro only viewed the images. He did not print them,

intentionally save them, or do anything other than just look at them on his computer screen. Although the pornographic images were automatically saved to an internet cache file on the computer's hard drive, there was no evidence that Diodoro knew that the images were saved, and the Commonwealth does not contend that Diodoro did anything but view the images on the screen.

The provision of the Crimes Code under which Diodoro was convicted reads as follows:

> Any person who **knowingly possesses or controls** any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such acts commits an offense.

18 Pa.C.S.A. § 6312(d) (emphasis added).

In my view, we are not just considering the following question: If a person merely views an image on a computer screen without doing anything else, does he or she "knowingly possess or control" those images? Rather, I believe the real question before us is: Is there an

ambiguity in the legislative definition of "possesses or controls," such that interpreting it in the light most favorable to the accused, the mere viewing of child pornography on a computer screen is not a crime?

The standard for interpreting a criminal statute is set forth in 1 Pa.C.S.A. § 1928(b), which states, "All provisions of a statute of the classes hereafter enumerated shall be strictly construed"; the first enumerated class is "penal provisions." At oral argument in this case, the Commonwealth agreed that penal statutes are to be strictly construed. This principle has been repeatedly cited by our appellate courts, and this Court recently stated: "According to the rules of statutory construction, where an ambiguity exists in the language of a penal statute, it should be interpreted in a light most favorable to the criminally accused." Commonwealth v. Ryan, 909 A.2d 839, 842 (Pa.Super.2006); see Commonwealth v. Dickson, 591 Pa. 364, 918 A.2d 95, 100 (2007);

Commonwealth v. McClintic, 589 Pa. 465, 909 A.2d 1241, 1246 (2006).

Were the legislature to amend the statute to prohibit individuals from "knowingly possessing, controlling, or viewing" child pornography, there would be no issue. But that is not what the legislature has done, at least not yet. As judges, we are only to interpret the law based on principles of statutory construction. It is not our job to rewrite the law when the legislature has not done so clearly. If the legislature fails to keep up with modern technology, it is not our responsibility to correct its oversight.

The discussions both in the briefs and at oral argument were quite heated on the question of whether mere viewing is the same as possessing and controlling. Precisely because reasonable minds can differ, section 6312(d) is, by definition, ambiguous. Because the statute is ambiguous, it must be construed strictly in favor of the

defendant. This means that Diodoro was not on fair notice that he was committing a crime by merely viewing the images without doing something more.

The majority focuses its analysis on the term "controls" in section 6312(d). Certainly, reasonable arguments can be made that Diodoro did knowingly "control" the images. Diodoro intentionally sought them out and caused them to appear on his computer screen. As the majority points out, if he had wanted to, Diodoro could have saved, forwarded, or printed them. The legislature's purpose was to curtail abuse of children by not only criminalizing taking photographs that depict child pornography or offering them for sale to others, but also to cut off the market for child pornographers by criminalizing the purchasers.

However, reasonable arguments can also be made that Diodoro did not knowingly "control" the images. While Diodoro might have had the ability to "control" the images

by downloading them, saving them, or printing them, he did not exercise his potential control over them. This is a fine, though critical, distinction.

For this reason, I take issue with the majority's discussion of the definition of "control." According to the majority, "Control means, inter alia, '[t]o exercise restraining or directing influence over.... The ability to exercise a restraining or directing influence over something.' " (Majority Op. at 174 (quoting Black's Law Dictionary 329 (6th ed.1990).)) The majority, however, quotes the dictionary definition out of context and omits a key portion of the definition, which is almost directly on point with the situation in this case.

Specifically, the verb "control" is defined as:

> To exercise restraining or directing influence over. To regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern.

Black's Law Dictionary 329 (6th ed.1990). The noun "control," on the other hand, is defined as:

> Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The ability to exercise a restraining or directing influence over something.

Id. (citation omitted). Thus, the verb "control" means to exercise influence over, whereas the noun "control" means the ability to exercise influence over. The statutory provision at issue in this case clearly uses the word "control" as a verb, so the former definition applies.

More importantly, the second paragraph of the noun definition, which the majority omits, offers the following example to illustrate the distinction:

> As used in [a] statute making it unlawful for any person to possess or "control" any narcotic drug, [the word "control"] is given its ordinary meaning, namely, to exercise restraining or directing influence over, and also has been defined to relate to authority over what is not in one's physical possession.

Id. (emphasis added) (citation omitted). In essence, the majority relies on the wrong definition and then ignores the usage that contradicts the meaning it wants.

Here, applying the proper, common sense definition of the verb "control," as used in section 6312(d), there was no evidence that Diodoro exercised any directing influence he might have had over the images on his computer screen, e.g., by downloading, saving, or printing them.

If a person intentionally enters the Philadelphia Art Museum to view Cezanne's bathers, one would not say that that person "possesses or controls" the painting. Why should it be different if a person visits the museum's website, www. philamuseum. org, and clicks on the part of the site that shows images of the same Cezanne bathers?

The issue here is not which argument is better. The issue is whether there is a reasonable argument on both sides. If so, then there is an ambiguity, and it is improper to base a criminal conviction on an ambiguous statute.

While the issue in this case is one of first impression in Pennsylvania, it has been addressed by a number of state and federal appellate courts. Not surprisingly, these

courts are split on the question of whether mere viewing constitutes knowing possession of child pornography, depending on the facts of the particular case as well as the applicable statutory language. The varied treatment of this issue amongst jurisdictions with similar, though not identical, statutory language supports the conclusion that the language in our statute is not sufficiently clear.

The federal statute outlawing such conduct does not merely use the words "possess or control," but also makes it a crime to "knowingly receive" child pornography, including that sent by computer. See 18 U.S.C.A. §§ 2252(a)(2) & (a)(4)(B). Yet even under federal jurisprudence, the mere viewing of images on the internet does not constitute the crime of possession of child pornography absent knowledge that the images are being saved.

In United States v. Romm, 455 F.3d 990 (9th Cir.2006), cert. denied, 549 U.S. 1150, 127 S.Ct. 1024, 166

L.Ed.2d 772 (2007), the Ninth Circuit upheld the defendant's conviction where he knew the images were automatically saved to a cache drive, and enlarged some of the images from the otherwise hidden cache drive and consciously erased them. Because the defendant knew the images were saved, the court noted that he had the ability to copy, print or email the images to others. Id. at 1000-01. The Romm court stated, "Therefore, to possess the images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession." Id. at 1000. That is the key difference in the instant case. Here, there is no evidence that Diodoro had any idea that the images were automatically saved in a hidden cache file.

The Eighth Circuit also held that merely viewing an image without knowing it is being saved does not constitute "possession" or even "receipt." In United States v. Stulock, 308 F.3d 922 (8th Cir.2002), while affirming

convictions for child pornography knowingly saved to a hard drive, the Eighth Circuit cited with approval the trial court's acquittal on the charge of possession of images found in the defendant's cache file, stating, "The possession charge specified only the images found in the browser cache.... [O]ne cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image." Id. at 925.

In United States v. Tucker, 305 F.3d 1193 (10th Cir.2002), the Tenth Circuit upheld a conviction for possession where the defendant intentionally sought out and viewed child pornography, knowing that the images would be saved on his hard drive. The defendant testified that: (1) he knew his web browser was automatically caching the images he viewed; (2) he did not want the images on his hard drive; and (3) he intentionally deleted

them from his cache file after each computer session. Therefore, his possession was knowing and voluntary. Id. at 1205. The court specifically declined to reach the question of "whether an individual could be found guilty of knowingly possessing child pornography if he viewed such images over the Internet but was ignorant of the fact that his Web browser cached such images." Id. at 1205 n. 16.

A recent Georgia appellate court decision dealing with the instant situation, where the defendant only viewed pictures on his computer screen, reversed the defendant's conviction. See Barton v. State, 286 Ga.App. 49, 648 S.E.2d 660 (2007). In Barton, the Georgia Court of Appeals reversed the conviction because there was no evidence that the defendant took any affirmative action to save the pornographic images on his computer, even though they were found in his computer's cache files. The court held that the mere existence of pornographic images in a computer's cache files is insufficient to constitute

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knowing possession, absent proof that the defendant either took affirmative action to save or download the images or knew that the computer automatically saved the files. Id. at 51-53, 648 S.E.2d at 663.

To the contrary, a recent Alabama appellate court decision upheld a defendant's conviction under virtually the same facts. See Ward v. State, 994 So.2d 293, 2007 WL 1228169 (Ala.Crim.App.2007). In Ward, the Alabama Court of Criminal Appeals upheld a conviction for possession of child pornography where the pornographic images were found only in the cache files on the defendant's computer. The court held that the defendant had exercised control over the images by "reaching out" to view them on the internet, thereby giving him the ability to print, e-mail, copy, or download them, even though there was no evidence that he had ever done so. Id. at ----, 2007 WL 1228169 at 8.

Several other state appellate courts have upheld convictions for possession of child pornography only where there was evidence that the defendant had intentionally saved or downloaded the images. See, e.g., Krause v. State, 243 S.W.3d 95, 2007 WL 2004940 (Tex.App.2007) (upholding conviction where evidence showed that images of child pornography had been deliberately saved to external devices such as compact disks and hard drive); State v. Mobley, 129 Wash.App. 378, 118 P.3d 413 (2005) (upholding conviction where there was sufficient evidence that defendant sought out and controlled pornographic images by downloading and/or saving them on his computer), app. denied, 157 Wash.2d 1002, 136 P.3d 758 (2006); Kromer v. Commonwealth, 45 Va.App. 812, 613 S.E.2d 871 (2005) (upholding conviction where evidence showed that defendant downloaded and saved images onto computer and desktop shortcut indicated that he manipulated them to be easily accessible and continuously

available); State v. Lindgren, 275 Wis.2d 851, 687 N.W.2d 60 (App.2004) (upholding conviction where defendant repeatedly visited child pornography websites, clicked on thumbnail images to create larger pictures for viewing, and saved at least one image to his personal folder).

If appellate courts from other jurisdictions struggle with the issue, how can this Court reasonably say that the language in our statute is clear enough to provide a layperson with fair warning that the mere viewing of child pornography on a computer screen is a crime?

Again, the legislature could have drafted section 6312(d) to criminalize the mere viewing of child pornography. In our sister state of New Jersey, for example, the statute does not merely prohibit the possession of child pornography. It also makes it a crime for any person to "knowingly view [ ]" child pornography. See N.J.S.A. § 2C:24-4(b)(5)(b); see also State v. Tanner, 2007 WL 2239184 (N.J.Super.App.Div. filed Aug. 6, 2007)

(upholding conviction under statute proscribing either viewing or possession of child pornography, where there was "overwhelming" evidence that defendant had viewed pornography via his computer).

While it well may be desirable for the Pennsylvania legislature to amend the statute to specifically proscribe the "viewing" of child pornography, as the New Jersey legislature did, it has not done so. Because the existing statute is ambiguous, I believe that we are required to adhere to the long-standing principle of strictly construing a penal statute in the defendant's favor, rather than making new law by redrafting the statute ourselves.

Accordingly, I would conclude that the evidence was insufficient to sustain Diodoro's convictions and must respectfully dissent.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, APPELLEE, v.	:	
ANTHONY DIODORO, APPELLANT.	:	No. 1889 EDA 2005

Argued July 26, 2006.
Filed Nov. 2, 2006.

BEFORE: MUSMANNO, KLEIN and TAMILIA, JJ.

OPINION BY KLEIN, J.:

¶ 1 Anthony Diodoro appeals from the judgment of sentence of 9 to 23 months' incarceration imposed upon his convictions for 30 counts of sexual abuse of children for possessing child pornography, 18 Pa.C.S.A. § 6312(d), and one count of criminal use of a communication facility, 18 Pa.C.S.A. § 7512(a). Because we conclude that Diodoro did not "knowingly possess" child pornography, we reverse.

¶ 2 Although the pornographic images were automatically saved to an internet cache file on the computer's hard drive, there is no evidence that Diodoro

knew that the images were saved. Therefore, the issue is whether merely *viewing* child pornography on the internet without intentionally *saving* or *downloading* any of the images constitutes "knowing possession" of child pornography under section 6312(d). We conclude that it does not.

¶ 3 This is an issue of first impression in Pennsylvania. We have found no case exactly on point in which a conviction for "possession" of child pornography for simply viewing it on a website without any evidence that the defendant knew the image was being saved on the computer's hard drive. In cases from other jurisdictions affirming such convictions, there was evidence that the defendant knew the images were being stored, and usually distinguished those cases from the situation where the defendant merely viewed the images without knowing they were being stored. Those cases point out that to establish possession, a defendant must know that the image is being

stored, so he or she knows he or she has the ability to save, print, or email the images to others.

¶ 4 We note that it is well within the power of the legislature to criminalize the act of viewing child pornography on a website without saving the image. The language used in section 6712(d), however, is simply "possession." Because this is a penal statute with an ambiguous term when it comes to computer technology, it must be construed strictly and in favor of the defendant. *See* 1 Pa.C.S.A. § 1928(b)(1). A defendant must have fair notice that his conduct is criminal. Because of the ambiguity, sufficient notice was not provided here. For this reason, we are constrained to reverse and leave it to the legislature to clarify the language if it intends to make the mere "viewing" of child pornography a crime.

¶ 5 The facts in this case were stipulated. Diodoro admitted that he viewed several hundred photographs that fit within the definition of child pornography. He also

admitted that he intentionally visited the websites for the purpose of viewing child pornography. (*See* N.T. Trial, 2/24/05, at 250-51.) The Commonwealth presented no evidence that Diodoro ever intentionally downloaded or saved the photographs to his hard drive or to any floppy drive or that he was aware that the images were automatically being saved to an internet cache file. (*See* Appellee's Brief at 12.)

¶ 6 At trial, the Commonwealth's computer forensics expert testified that when a website is viewed, the image is automatically saved to an internet cache file. (N.T. Trial, 2/24/05, at 248-49.) The purpose is to save time, so that if the site is viewed again, the old file can be quickly uploaded rather than requiring the time to reload the file. However, the Commonwealth presented no evidence that Diodoro *knew* that the pornographic images were being saved to a hidden file or that he could retrieve it relatively easily.

¶ 7 Section 6312(d) prohibits the following conduct:

Any person who **knowingly possesses or controls** any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such acts commits an offense.

18 Pa.C.S.A. § 6312(d) (emphasis added). To establish the elements of the offense, the Commonwealth must prove beyond a reasonable doubt: (1) a depiction of an actual child engaged in a prohibited sexual act or simulated sexual act; (2) the child depicted is under the age of 18; and (3) the defendant knowingly possessed or controlled the depiction. Commonwealth v. Davidson, 860 A.2d 575, 580 (Pa.Super.2004), app. granted, 582 Pa. 356, 871 A.2d 185 (2005).

¶ 8 The Commonwealth does not contend that "possession" of child pornography was established by the

fact that the images were, in fact, saved on Diodoro's computer. Instead, the fact that 370 images were saved on the computer is considered evidence that Diodoro intentionally viewed child pornography rather than accidentally clicked on a website without knowledge. Diodoro does concede that he intentionally viewed child pornography on the internet, while denying that he intentionally saved it to his computer or even knew that it was saved.

¶ 9 Therefore, while the Commonwealth proved that Diodoro intentionally viewed child pornography on the internet, it failed to prove that he intentionally saved the images to his computer.

¶ 10 The question before us is whether viewing a pornographic image on a computer screen without intentionally downloading or saving it amounts to "constructive possession" such that it constitutes a crime. This is an issue of first impression in Pennsylvania.[FN1] To

date, we have found no state or federal appellate case that has held that it is a crime.

¶ 11 If there is evidence that the defendant *knew* that the images would be saved to a cache file on his computer, that would be sufficient to establish possession. However, in this case, Diodoro claims that he did not know that every image he viewed was automatically saved to a hidden file.

¶ 12 A criminal statute must be sufficiently specific so as to give reasonable notice of the proscribed conduct. Commonwealth v. Heinbaugh, 467 Pa. 1, 354 A.2d 244, 246 (1976); Commonwealth v. Highhawk, 455 Pa.Super. 186, 687 A.2d 1123, 1128 (1996). The Pennsylvania legislature could have drafted section 6712(d) in such a way that the mere viewing of child pornography is a crime, but it did not.

¶ 13 In fact, the federal statute outlawing such conduct does not merely use the term "possession," but also makes it a crime to "knowingly receive" child pornography,

including that sent by computer. *See* 18 U.S.C.A. §§ 2252(a)(2) & (a)(5)(B). Yet even under federal jurisprudence, the mere viewing of images on the internet does not constitute the crime of possession of child pornography absent knowledge that the images are being saved.

¶ 14 In the recent case of United States v. Romm, 455 F.3d 990 (9th Cir.2006), the Ninth Circuit upheld the conviction where the defendant admitted that he *knew* the images were automatically saved to a cache drive, and enlarged some of the images from the otherwise hidden cache drive and consciously erased them. Because the defendant knew the images were saved, the court noted that he had the ability to copy, print or email the images to others. Id. at 1000-01. The *Romm* court stated, "Therefore, to possess the images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession." Id. at

1000. That is the key difference in the instant case. Here, there is no evidence that Diodoro had any idea that the images were automatically saved in a hidden cache file.

¶ 15 The Eighth Circuit also held that merely viewing an image without knowing it is being saved does not constitute "possession" or even "receipt." In United States v. Stulock, 308 F.3d 922 (8th Cir.2002), while affirming convictions of child pornography knowingly saved to a hard drive, the Eighth Circuit cited with approval the trial court's acquittal on the charge of possession of images found in the defendant's cache file, stating, "The possession charge specified only the images found in the browser cache.... [O]ne cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image." Id. at 925.

¶ 16 In United States v. Tucker, 305 F.3d 1193 (10th Cir.2002), the Tenth Circuit upheld a conviction for possession where the defendant intentionally sought out and viewed child pornography, knowing that the images would be saved on his hard drive. The defendant testified that: (1) he knew his web browser was automatically caching the images he viewed; (2) he did not want the images on his hard drive; and (3) he intentionally deleted them from his cache file after each computer session. Therefore, his possession was knowing and voluntary. Id. at 1205. The court specifically declined to reach the question of "whether an individual could be found guilty of knowingly possessing child pornography if he viewed such images over the Internet but was ignorant of the fact that his Web browser cached such images." Id. at 1205 n. 16.

¶ 17 Moreover, several state appellate courts have upheld convictions for possession of child pornography where there was evidence that the defendant had intentionally

saved the images. *See, e.g.,* State v. Mobley, 129 Wash.App. 378, 118 P.3d 413 (2005) (upholding conviction where there was sufficient evidence that defendant sought out and controlled pornographic images by downloading and/or saving them on his computer), app. denied, 157 Wash.2d 1002, 136 P.3d 758 (Wash.2006); Kromer v. Commonwealth, 45 Va.App. 812, 613 S.E.2d 871 (2005) (upholding conviction where evidence showed that defendant downloaded and saved images onto computer and desktop shortcut indicated that he manipulated them to be easily accessible and continuously available); State v. Lindgren, 275 Wis.2d 851, 687 N.W.2d 60 (App.) (upholding conviction where defendant repeatedly visited child pornography websites, clicked on thumbnail images to create larger pictures for viewing, and saved at least one image to his personal folder), app. denied, 276 Wis.2d 28, 689 N.W.2d 56 (Wis.2004).

¶ 18 We agree with the reasoning of these decisions. We hold that absent specific statutory language prohibiting the mere viewing of pornographic images or evidence that the defendant knowingly downloaded or saved pornographic images to his hard drive or knew that the web browser cached the images, he cannot be not criminally liable for viewing images on his computer screen. Therefore, we conclude that the evidence was insufficient to sustain Diodoro's conviction for knowing possession of child pornography under section 6312(d).

¶ 19 As to Diodoro's second claim, because we conclude that the evidence is insufficient to establish possession, it is also insufficient to establish criminal use of a communication facility. *See* 18 Pa.C.S.A. § 7512(a). Because the Commonwealth failed to prove that Diodoro committed a crime by merely viewing child pornography on his computer, his conviction for criminal use of a communication facility cannot stand.

¶ 20 Judgment of sentence reversed. Defendant is discharged.

FN1. In Davidson, supra, this Court considered whether the evidence was sufficient to sustain the defendant's conviction for possession of child pornography under section 6312(d) based on computer images on his hard drive. However, the issue in that case was not whether mere viewing constitutes "possession" under section 6312(d). In Davidson, the defendant asserted that there were so many images on his computer and so few images of child pornography in comparison as to raise an inference that he did not know the pornography existed at all. 860 A.2d at 579. Our Court upheld the conviction because (1) the images were found in more than one location on the computer's hard drive, (2) the defendant was the admitted builder, owner, and administrator of his computer with specialized computer knowledge, and (3) he admitted

downloading pornography "randomly." Id. at 581.We note that our Supreme Court granted review in Davidson, limited to constitutional questions relating to section 6312(d). *See* Commonwealth v. Davidson, 582 Pa. 356, 871 A.2d 185 (2005).

IN DELAWARE COUNTY, COURT OF COMMON PLEAS, PENNSYLVANIA, CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	No. 2200-04
vs.	:	
ANTHONY DIODORO.	:	

OPINION

CRONIN, J. FILED 12/29/05

I. FACTUAL AND PROCEDURAL HISTORY

On or about November 20, 2003, members of the Ridley Township Police Department obtained a search warrant for the personal computer of Anthony Diodoro (hereinafter "Appellant Diodoro") and seized said computer from Appellant Diodoro's residence located at 218 Baltimore Avenue, Ridley Township, Delaware County, Pennsylvania. Appellant Diodoro's computer was submitted for forensic examination and it was determined that said computer contained approximately three hundred and seventy (370) photographs of suspected child

pornography, thirty (30) of which were known to be child pornography. As a result, Appellant Diodoro was arrested and charged with thirty (30) counts of Sexual Abuse of Children (18 Pa.C.S.A. § 6312(d)) and Criminal Use of a Communication Facility (18 Pa.C.S.A. § 7512(a)).

On February 24, 2005 and February 25, 2005, Appellant was tried before a jury and convicted of thirty (30) counts of Sexual Abuse of Children and one (1) count of Criminal Use of a Communication Facility. On May 23, 2005, Appellant Diodoro was sentenced to serve an aggregate term of confinement of not less than nine (9) months nor more than twenty-three (23) months, followed by five (5) years of probation. Appellant Diodoro was also required to submit to DNA testing and was prohibited from having unsupervised use of a computer, unsupervised contact with children under the age of eighteen (18) and he was prohibited from using drugs or alcohol.

On June 21, 2005, Appellant Diodoro filed a Notice of Appeal, appealing the Judgment of Sentence. On the same date, Appellant Diodoro also filed a Concise Statement of Matters Complained of on Appeal, wherein he raised the following issues for review on appeal:

1. The evidence, including the presence of images of female children engaged in prohibited sexual acts in the cache files of the defendant's computer and the defendant's admission that he had been searching the internet to view images of females under age 16, was insufficient to support defendant's conviction for knowing possession of child pornography in violation of 18 Pa.C.S.A. § 6312(d).
2. The evidence, including the presence of images of female children engaged in prohibited sexual acts in the cache files of the defendant's computer and the defendant's admission that he had been searching the internet to view images of females under age 16, was insufficient to support defendant's conviction for criminal use of a communication facility in violation of 18 Pa.C.S.A. § 7512(a).

II. LEGAL ANALYSIS

The issues raised in Appellant Diodoro's Concise Statement of Matters Complained of on Appeal challenge the sufficiency of the evidence. A claim challenging the sufficiency of the evidence is a question of law.

Commonwealth v. Dale, 2003 Pa.Super. 413, 836 A.2d 150 (2003). When reviewing a challenge to the sufficiency of the evidence to support a conviction, the court must determine whether the evidence was sufficient to enable the trier of fact to find every material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt, viewing the evidence and the reasonable inference therefrom in a light most favorable to the Commonwealth, as the verdict winner. Id. See also Commonwealth v. McCloskey, 2003 Pa.Super. 409, 835 A.2d 801 (2003); Commonwealth v. Hargrave, __ Pa.Super.__, 745 A.2d 20 (2000); Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745 (2000). The Superior Court may not reweigh the evidence and substitute its judgment for that of the finder of fact. Commonwealth v. Hopkins, __Pa.Super.__, 747 A.2d 910 (2000). If the fact finder reasonably could have determined from the evidence adduced that all of the necessary elements of the crime

were established, then that evidence will be deemed to support the verdict. Commonwealth v. Wood, 432 Pa.Super. 183, 637 A.2d 1335 (1994). The standard applies equally to cases in which the evidence is circumstantial, rather than direct, as long as the evidence as a whole, links the accused to the crime charged beyond a reasonable doubt. Commonwealth v. Hardcastle, 519 Pa. 236, 546 A.2d 1101 (1988); Commonwealth v. Swerdlow, 431 Pa. Super. 453, 636 A.2d 1173 (1994). Additionally, mere conflicts in the testimony of the witnesses does not render the evidence insufficient. Commonwealth v. Moore, 436 Pa.Super. 495, 648 A.2d 331 (1994). Issues of credibility are left to the finder of fact, who is free to accept all, part, or none of a witness's testimony. Commonwealth v. Marks, __ Pa.__, 704 A.2d 1095 (1997); Commonwealth v. Johnson, 542 Pa. 384, 668 A.2d 97 (1995); Commonwealth v. Valette, 531 Pa. 384, 388, 613 A.2d 548 (1992); Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d

621 (1995); Commonwealth v. Kelley, 444 Pa.Super. 377, 664 A.2d 123 (1995); Commonwealth v. Lytle, 444 Pa.Super. 126, 663 A.2d 707 (1995). Questions of doubt are for the finder of fact, unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the totality of the circumstances. Commonwealth v. Cassidy, 447 Pa.Super. 192, 668 A.2d 1143 (1995); Commonwealth v. Govens, 429 Pa.Super. 464, 488, 632 A.2d 1316 (1993), alloc. Den., 539 Pa.675, 652 A.2d 1321 (1994). Only when evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, can the evidence be considered insufficient as a matter of law. Commonwealth v. Widmer, supra.

With respect to the crime of Sexual Abuse of Children, 18 Pa.C.S.A. § 6312(d)(1) states in relevant part that

> Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of eighteen 18 years

> engaging in a prohibited sexual act or in the simulation of such act commits an offense.

Furthermore, 18 Pa.C.S.A. § 6312(a) states:

> "prohibited sexual act" means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, felatio, cunnilingus, lewd exhibition of the genitals or nudity is such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.

With respect to the crime of Criminal Use of a Communications Facility, 18 Pa.C.S.A. § 7512(a) states

> A person commits a felony of the third degree if that person uses a communications facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 know as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

At trial, Appellant Diodoro and the Commonwealth stipulated as follows: "The thirty (30) unlawful images located on the hard drive of the Defendant's computer depicted, pictured and showed female children engaged in prohibited sexual acts. Those acts include sexual

intercourse, oral sexual intercourse and lewd exhibition of genitals. The second fact is that the thirty (30) unlawful images were viewed by Anthony Diodoro on his computer while he was searching the World Wide Web for images of females under age sixteen (16)." (N.T. 2/23/05 at 250, 251)

At trial, the Commonwealth called as a witness, Trooper Peter J. Salerno of the Pennsylvania State Police. (N.T. 2/23/05 at 207). Troooper Salerno testified that he was a member of the Computer Crime Unit of the Bureau of Criminal Investigations. (N.T. 2/23/05 at 208). He is the Area 5 Computer Crime Task Force Coordinator. (N.T. 2/23/05 at 209). Trooper Salerno was accepted as an expert in the field of computer forensics. (N.T. 2/23/05 at 216). Trooper Salerno testified that when images or photographs appear on a computer screen, they can be stored in a cache. (N.T. 2/23/05 at 220). The cache can be stored in one(1) of two (2) places. (N.T. 2/23/05 at 220). The first place is the RAM (random access memory), which

is a volatile memory because when the computer shuts down, the images or photographs disappear. (N.T. 2/23/05 at 221). The second place it can be stored is the swap space on the computer hard drive, which is the area of a hard drive that is not volatile, because it remains on the hard drive until it is overwritten. (N.T. 2/23/05 at 221).

Trooper Salerno testified that he was asked to examine an I-Mac computer owned by Appellant Diodoro. (N.T. 2/23/05 at 221). He stated that Appellant Diodoro's hard drive was copied to their forensic machine's hard drive and he with through the images contained on Appellant's hard drive using software known as "Encase." (N.T. 2/23/05 at 221, 222). "Encase" is produced by Guidance Software, which enables a person to make a bit-for-bit image of a machine and *inter alia,* examine graphics, photographs, text documents, Internet history and web pages. (N.T. 2/23/05 at 222). Trooper Salerno used "Encase" to search Appellant Diodoro's hard drive to

look for images and web history. (N.T. 2/23/05 at 222). Trooper Salerno testified that the results of his examination revealed in excess of three hundred seventy (370) images depicting child pornography, web pages pertaining to child pornography sites, web pages pertaining to teenmatchmaker.com and web pages pertaining to "Lolita," which, in the Internet world, refers to prepubescent girls. (N.T. 2/23/05 at 223, 229). Trooper Salerno testified that the approximately three hundred seventy (370) images were found either in the cache files or unallocated space. (N.T. 2/23/05 at 230). Trooper Salerno stated that the fact that the images were stored in the cache files indicates that the images were viewed because someone had to click the "next" button on the screen and it would have taken a period of time to go through the images as a result of the quantity stored. (N.T. 2/23/05 at 230, 231, 248).

The Commonwealth is permitted to prove each and every element of a crime beyond a reasonable doubt by means of wholly circumstantial evidence. Commonwealth v. Robertson-Dewar, 2003 Pa.Super. 280, 829 A.2d 1207 (2003). In the case *sub judice*, the Commonwealth did in fact sustain its burden of proof based upon circumstantial evidence. Specifically, as stated above, Appellant Diodoro and the Commonwealth stipulated that thirty (30) unlawful images located on Appellant Diodoro's computer depicted, pictured and showed female children engaged in prohibited sexual acts, including sexual intercourse, oral sexual intercourse and lewd exhibition of genitals. Hence, there was no dispute that the subject images depicted children under the age of eighteen 18 years engaging in prohibited sexual acts or in the simulation of such acts. The stipulation further provided that the thirty (30) unlawful images were viewed by Anthony Diodoro on his computer while he was searching the World Wide Web for

images of females under age sixteen (16). Accordingly, there is no dispute that Appellant Diodoro was an individual who, at various times, searched the Internet for child pornography and that he viewed the subject thirty (30) photographs. Moreover, Trooper Salerno testified essentially that the three hundred seventy (370) images depicting child pornography, web pages pertaining to child pornography sites, web pages pertaining to teenmatchmaker.com and web pages pertaining to "Lolita" were found either in the cache files or unallocated space, which means that the images were viewed because someone hd to click the "next button on the screen and it would have take a period of time to go through the images as a result of the quantity stored. (N.T. 2/23/05 at 230, 231, 248). This proved that, at various times, an individual controlled child pornography and that a communications facility (the computer) was utilized to do so.

In light of Trooper Salerno's testimony and in light of the stipulation entered into between Appellant Diodoro and the Commonwealth, the testimony and evidence presented at trial, although circumstantial, was sufficient to prove beyond a reasonable doubt, each and every element of the crimes of Sexual Abuse of Children (18 Pa.C.S.A. § 6312(d)) and Criminal Use of a Communication Facility (18 Pa.C.S.A. § 7512(a)).

III. CONCLUSION:

For the foregoing reasons, the Judgment of Sentence should be affirmed on appeal.

BY THE COURT,

/S/
JOSEPH P. CRONIN, JR. J.